Supreme Court, U.S.
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No. 10-

IN THE
SUPREME COURT OF THE UNITED STATES

KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J. FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Conditional Cross-Petitioners,

v.

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, ALLEN G. SWEET, JAMES R. QUINN, DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSON, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, MARGARET REYNEER, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Conditional Cross-Respondents.

ON CROSS-PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This disparate impact age discrimination case, which has been here twice before (*see KAPL, Inc. v. Meacham*, 544 U.S. 957 (2005); *Meacham v. KAPL, Inc.*, 554 U.S. 84 (2008) ("*Meacham*")), again raises important questions about proper application of the "reasonable factors other than age" ("RFOA") defense in the Age Discrimination in Employment Act ("ADEA"). In *Meacham*, this Court held that RFOA is an affirmative defense on which employers bear the burden of persuasion. *Id.* The Court of Appeals' judgment in *Meacham v. KAPL, Inc.*, 461 F.3d 134 (2d Cir. 2006) ("*Meacham II*"), adopting a contrary view, was thus vacated and the case remanded for further consideration consistent with *Meacham*.

On remand, the Second Circuit correctly held that there was no issue of waiver, but failed to answer directly the question remanded: namely, whether the outcome in *Meacham II* – where the court previously "showed no hesitation in finding that Knolls prevailed on the RFOA defense" – should be any different with Knolls bearing the burden of persuasion. Instead, the court has ordered a new trial in this 14-year-old case, raising these questions:

> 1. Whether the Summary Order conflicts with the opinion and mandate in *Meacham*, with *Smith v. City of Jackson*, 544 U.S. 228 (2005), and other decisions by this Court, in failing to determine as a matter of law on the existing trial record if Knolls satisfied its burden of persuasion on the RFOA defense?

2. Whether the Summary Order conflicts with decisions of other circuit courts, and with certain prior still-valid findings in *Meacham II*, in concluding that "uncertainty and [complicating] changes in the governing law" preclude the grant of judgment as a matter of law to Knolls on its RFOA defense?

3. Whether *Meacham* and *City of Jackson* preclude employees, who have conceded the reasonableness of the non-age layoff factors in question, from defeating an employer's RFOA showing with allegations of "subconscious age bias" or "application problems," or by showing that there were alternative non-age factors available that may have had less of a disparate impact?

LIST OF THE PARTIES

The following individuals were named as parties in the proceedings before the United States District Court for the Northern District of New York and the United States Court of Appeals for the Second Circuit, and were included in the caption of both of these proceedings below, but they are believed to have no interest in the outcome of this petition: Henry Bielawski, Ronald G. Butler, Sr., James S. Chambers, Arthur J. Kaszubski, David J. Kopmeyer, Christine A. Palmer, Frank A. Paxton, Janice M. Polsinelle, Hildreth E. Simmons, Teofolis F. Turlais, and Bruce E. Vedder. Notice of non-interest has been served upon each of these individuals pursuant to Supreme Court Rule 12.6.

All other parties in the courts below are named in the caption to this cross-petition.

STATEMENT PURSUANT TO RULE 29.6

KAPL, Inc.'s parent corporation is Lockheed Martin Corporation, which owns 100% of KAPL Inc.'s stock. The only publicly traded company which is known to beneficially own 10% or more of Lockheed Martin Corporation's stock, as reported on a Schedule 13G filed on February 12, 2010, pursuant to the Securities Exchange Act of 1934, is:

State Street Corporation, 20.0%

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF THE PARTIES iii

STATEMENT PURSUANT TO RULE 29.6 iv

TABLE OF CONTENTS v

TABLE OF CITED AUTHORITIES vii

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND ORDERS BELOW 1

STATEMENT OF JURISDICTION 3

STATUTORY PROVISIONS AND REGULATIONS 3

STATEMENT OF THE CASE 4

Factual Background 4

Relevant Pre-Trial Proceedings 4

Knolls' RFOA Evidence at Trial 6

The Jury Instructions on Disparate Impact 11

Knolls' "RFOA" Arguments in Summation 15

The Jury Verdicts on Treatment and Impact..... 17

KAPL's Rule 50 Motions 18

The Magistrate's Denial of Knolls' Rule 50(b) Motion on Petitioners' Impact Claims 20

The Second Circuit's Decision in *Meacham I*..... 21

This Court's Granting of Knolls' Petition for a Writ of Certiorari in 2005 23

The Second Circuit's Decision in *Meacham II*..... 24

Subsequent Appellate History 25

REASONS FOR GRANTING THE PETITION 28

This Case and the Questions Presented Are of Exceptional National Importance 28

The Summary Order Conflicts With and Fails to Fully Execute the Mandate in *Meacham*..... 31

The Summary Order Conflicts With Decisions in Other Circuits on Similar Questions 36

The Summary Order Conflicts With *Reeves* and Other Supreme Court Cases 40

CONCLUSION 43

TABLE OF CITED AUTHORITIES

Page(s)

FEDERAL CASES

Adams v. Lucent Techs., Inc.,
No. 2:03cv300, 2007 U.S. Dist. LEXIS 662
(S.D. Ohio Jan. 3, 2007), *aff'd*, 284 Fed.
Appx. 296 (6th Cir. 2008) 38

Aldridge v. City of Memphis,
No. 05-2966, 2008 U.S. Dist. LEXIS 67539
(W.D. Tenn. July 31, 2008) 38

Aliotta v. Bair,
576 F. Supp. 2d 113 (D.D.C. 2008) 38

Allen v. Highlands Hosp. Corp.,
545 F.3d 387 (6th Cir. 2008) 31, 37

Durante v. Qualcomm, Inc.,
144 Fed. Appx. 603 (9th Cir. 2005) 37

Embrico v. United States Steel Corp.,
404 F. Supp. 2d 802 (E.D. Pa. 2005), *aff'd*,
245 Fed. Appx. 184 (3d Cir. 2007) 38

Gallagher v. The IBEW Local Union No. 43,
No. 5:00CV1161, 2008 U.S. Dist. LEXIS
81615 (N.D.N.Y. Oct. 15, 2008) 38

Gambill v. Duke Energy Corp.,
No. 1:06-CV-00724, 2009 U.S. Dist. LEXIS
83126 (S.D. Ohio Sept. 10, 2009)..... 38

KAPL, Inc. v. Meacham ("Meacham"),
544 U.S. 84, 128 S. Ct. 2395 (2008).....passim

Magnello v. TJX Cos., Inc.,
556 F. Supp. 2d 114 (D. Conn. 2008) 38

Meacham v. KAPL, Inc.,
185 F. Supp. 2d 193 (N.D.N.Y. 2002).....passim

Meacham v. KAPL, Inc. ("Meacham I"),
381 F.3d 56 (2d Cir. 2004) .....passim

Meacham v. KAPL, Inc.,
544 U.S. 228 (2005)..... 2, 24

Meacham v. KAPL, Inc.,
544 U.S. 957 (2005)..... 2, 23

Meacham v. KAPL, Inc. ("Meacham II"),
461 F.3d 134 (2d Cir. 2006) .....passim

Meacham v. KAPL, Inc.,
305 Fed. Appx. 748 (2d Cir. 2009)..... 2, 26

Meacham v. KAPL, Inc.,
627 F. Supp. 2d 72 (N.D.N.Y. 2009)..... 1, 26

Ontario v. Quon,
No. 08-1332, __U.S.__ (Jun. 17, 2010) . 29, 31, 41

Pippin v. Burlington Res. Oil and Gas Co.,
440 F.3d 1186 (10th Cir. 2006) 37

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133 (2000) 31, 40, 41

Smith v. City of Jackson,
544 U.S. 228 (2005) ..... passim

Smith v. Xerox,
196 F.3d 358 (2d Cir. 1999) 11, 12

Summers v. Winter,
303 Fed. Appx. 716 (11th Cir. 2008) 37

Suslovic v. Black & Decker, Inc.,
No. 1:06CV116, 2007 U.S. Dist. LEXIS
53055 (N.D. Ohio July 23, 2007) 39

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989) 11, 12

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 12

FEDERAL STATUTES

28 U.S.C. § 1254(1) 3

42 U.S.C. § 2000e *et seq.* 24

29 U.S.C. § 623(f)(1) 3

STATE STATUTES

N.Y. Exec. Law § 296(3-a)(d) 4

REGULATIONS

29 C.F.R. § 1625.7(d) 13

PROPOSED REGULATIONS

Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act, 75 Fed. Reg. 7212 (proposed February 18, 2010) (to be codified at 29 C.F.R. Part 1625) 13

RULES

Sup. Ct. R. 12.5 ..... 1, 3

Fed. R. Civ. P. 50 ..... passim

OTHER AUTHORITIES

Daniel B. Kohrman, *The ADEA at 40: The Supreme Court Confronts Old Age*, 42 Clearinghouse Rev. 463 (January/February 2009) 28

Michael G. Cleveland on Meacham v. Knolls Atomic Power Laboratory, 2008 Emerging Issues 2560 (July 16, 2008) 28

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 12.5, cross-petitioners ("Knolls") respectfully submit this Conditional Cross-Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS AND ORDERS BELOW

The *Order Denying Cross-Petitioner Knolls' Petition for En Banc Consideration and Panel Rehearing* by the Second Circuit is an unpublished order entered on February 23, 2010. It is reproduced in the Appendix to the Petition for Writ of Certiorari (the "Appendix" or "App.") filed by plaintiffs (here, "petitioners") in *Meacham et al. v. Knolls Atomic Power Laboratory, Inc. et al.*, No. 09-1449, at App. 64a-65a.

The *Summary Order Vacating Judgment and Remanding Case for New Trial* by the United States Court of Appeals for the Second Circuit is an unpublished opinion entered on December 21, 2009. App. 1a-5a.

The *Order Reinstating the Second Amended Judgment* by the United States District Court for the Northern District of New York, filed on May 1, 2009, is published at 627 F. Supp. 2d 72 (N.D.N.Y. 2009). App. 6a-34a.

The *Order Remanding Case for Further Proceedings* by the United States Court of Appeals for the Second Circuit, entered on January 7, 2009, is published at 305 Fed. Appx. 748 (2d Cir. 2009). App. 35a-37a.

The *Order Vacating Judgment and Remanding Case for Further Proceedings* by the Supreme Court of the United States, entered on June 19, 2008, is published at 554 U.S. 84, 128 S. Ct. 2395 (2008).

The *Order Vacating Judgment and Remanding with Instructions to Enter Judgment as a Matter of Law in Favor of Employer* by the United States Court of Appeals for the Second Circuit, entered on August 14, 2006, is published at 461 F.3d 134 (2d Cir. 2006).

The *Order Vacating Judgment and Remanding for Further Consideration in Light of Smith v. City of Jackson*, 544 U.S. 228 (2005), by the Supreme Court of the United States, entered April 4, 2005, is published at 544 U.S. 957 (2005).

The *Order Affirming Judgment* by the United States Court of Appeals for the Second Circuit, entered on August 23, 2004, is published at 381 F.3d 56 (2d Cir. 2004).

The *Order Denying Knolls' Motion for Judgment as a Matter of Law* by the United States

District Court for the Northern District of New York, entered on February 13, 2002, is published at 185 F. Supp. 2d 193 (N.D.N.Y. 2002).

The *Order Entering Amended Judgment* by the United States District Court for the Northern District of New York is an unpublished order entered on December 11, 2000.

The *Order Denying Knolls' Motion for Summary Judgment* by the United States District Court for the Northern District of New York is an unpublished Order entered on December 15, 1999.

STATEMENT OF JURISDICTION

The Summary Order and judgment of the United States Court of Appeals for the Second Circuit was entered on December 21, 2009 (App. 1a-5a). The Court denied a timely motion for rehearing *en banc* on February 23, 2010. (App. 64a-65a). The Petition was filed on May 24, 2010 and was placed on this Court's docket on June 1, 2010. This Conditional Cross-Petition is timely pursuant to Rule 12.5 of the Rules of this Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS

The relevant statutory provision of the Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1), provides in pertinent part that: "[i]t shall

not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age."[1]

STATEMENT OF THE CASE

Factual Background

Relevant Pre-Trial Proceedings

After being involuntarily laid off from their salaried jobs at Knolls Atomic Power Laboratory in 1996, petitioners commenced this consolidated action, claiming they were discriminated against because of age in violation of state and federal laws. Petitioners pressed their claims on both disparate treatment and disparate impact theories. From the outset, with the filing of its Answer, Knolls raised numerous "defenses," including one closely tracking the RFOA language of both the ADEA and state law.

After extensive discovery, including the pre-trial depositions of numerous KAPL managers on

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[1] Similarly, New York Executive Law Section 296(3-a)(d) provides in relevant part that: "Notwithstanding any other provision of law, no employee shall be subject to termination . . . from employment on the basis of age, except . . . where the differentiation is based on reasonable factors other than age . .

the design, development, and use of the layoff factors at issue in this case (i.e., criticality of skills, flexibility to perform more than one job, job performance, and company service), Knolls moved for summary judgment on petitioners' disparate impact claims. Central to that motion was Knolls' contention that petitioners "were evaluated for layoff purposes using a matrix which rated four characteristics: performance, company service, criticality and flexibility."

In support of its dispositive motion, Knolls argued that these four criteria are "work-related attributes" and that:

> [E]ven if [petitioners] were able to establish a prima facie case [of disparate impact age discrimination, which Knolls has always maintained petitioners failed to do], they [were] unable to satisfy their burden of demonstrating that [Knolls'] legitimate business objectives, i.e., a mandated staff reduction, could have been achieved by reasonable means other than those that were employed.

Without specifically addressing any of these arguments, the district court denied the motion, finding "genuine issues of material fact which preclude summary judgment" and that "[a] prima

facie case has been established . . . requiring a jury trial."

Knolls' RFOA Evidence at Trial

The case proceeded to trial on both petitioners' disparate treatment and disparate impact claims. During the five-week liability phase of the trial, more than forty (40) witnesses testified, including three experts (one for the petitioners; two for Knolls). Eighteen (18) lay witnesses were called by petitioners in their case in chief (only seven of these witnesses were members of the plaintiff class). Another twenty-four (24) witnesses were called by Knolls in defense. When Knolls rested, petitioners offered no rebuttal.

The majority of the witnesses who testified were KAPL managers involved in ranking petitioners for layoff. These witnesses demonstrated intimate knowledge about the layoff factors at issue here and how they were applied to petitioners, and about the design and implementation of the involuntary reduction in force ("IRIF" or "RIF") resulting in petitioners' layoff.

The testimony of these KAPL managers about the legitimacy and reasonableness of the non-age factors used to select petitioners for layoff – including "criticality" and "flexibility" – was not evenly or "closely balanced." *Meacham*, 128 S. Ct. at 2406 (quoting *Schaffer v. Weast*, 546 U.S. 49, 56

(2005) in observing that the "burden of persuasion answers 'which party loses if the evidence is closely balanced'"). Indeed, the existing trial record demonstrates that Knolls' proof of reasonableness and legitimacy with respect to its use of the non-age factors criticality and flexibility was overwhelmingly one-sided in favor of Knolls and was never directly challenged by petitioners. *See Meacham II*, 461 F.3d at 145 (petitioners "did not directly challenge the testimony of KAPL principals regarding the planning and execution of the IRIF.").

This unchallenged proof of "reasonableness" included the layoff matrices prepared by petitioners' managers. On these matrices, similarly situated employees with certain "excess skills" were rated for layoff based on their comparative scores for company service, job performance, criticality, and flexibility.

Knolls' undisputed proof of reasonableness also included the testimony of KAPL managers who explained the importance of using criticality and flexibility to rate employees for layoff. *Id. at* 144 ("KAPL's staffing manager testified to the importance of criticality and flexibility to ensuring that KAPL could carry on operations with a shrinking workforce."). This uncontested evidence proved that an employee's flexibility to perform tasks outside his/her existing roles was imperative. This evidence likewise proved that criticality was a reasonable factor to use because KAPL needed to

retain those employees who possessed unique knowledge and skills essential to the Laboratory's ongoing work. The unchallenged trial evidence further proved that Knolls used these job-related non-age factors to select employees for layoff only as a last resort and only after considering the best practices of other companies that had performed similar layoffs, including GE, IBM, Ford, and others.

Knolls' proof of reasonableness at trial also included evidence demonstrating, *inter alia*, that KAPL managers received training and written guidance on the meaning and definitions of "criticality" and "flexibility" and how to apply them. As explained by Justice Souter, writing for the Court in *Meacham:*

> The "flexibility" instruction read: "Rate the employee's flexibility within the Laboratory. Can his or her documented skills be used in other assignments that will add value to current or future Lab work? Is the employee retrainable for other Lab assignments?" The "critical skills" instruction read: "How critical are the employee's skills to continue work in the Lab? Is the individual's skill a *key* technical resource for the [Naval Reactors] program? Is the skill readily accessible within the Lab or

> generally available from the external market? "

128 S. Ct. at 2398 n.2 (original emphasis).

Knolls also introduced evidence proving that a review board made up of senior managers was empanelled to rigorously examine the managers who selected petitioners and others for layoff to ensure that the rankings were legitimate, appropriate, and consistent with the ongoing and future needs of the Laboratory. Based on this and other evidence introduced by Knolls at trial, the Second Circuit correctly observed in *Meacham II* that "KAPL set standards for managers constructing matrices and selecting employees for layoff, and it did monitor the implementation of the IRIF," thereby "restrict[ing] arbitrary decision-making by individual managers." *Meacham II*, 461 F.3d at 145-46.

The uncontested proof of "reasonableness" at trial also included the expert testimony of Dr. Frank Landy, a "specialist in industrial psychology with substantial corporate downsizing experience." *Id.* at 144. Notably, before Landy was called as a witness, petitioners, having long ago been placed on notice that Landy would testify that "the criteria [Knolls] used in its IRIF were legitimate, non-discriminatory factors," moved to preclude his testimony. In seeking to exclude Landy's testimony about Knolls' adherence to certain corporate "best practices" and about the job-related nature of the layoff factors in

question, petitioners argued, unsuccessfully, that Landy's testimony would invade the province of the jury and be unduly prejudicial to petitioners because Landy was expected to "render an opinion as to whether the [layoff] process was fair." ((Joint Appendix ("JA") 2632-35)).

Petitioners thus knew at the time of trial not only that Knolls had interposed a specific RFOA defense in its Answer, supported at trial by the layoff matrices themselves and the testimony of numerous Laboratory managers, but also that Landy would testify that he "found the [layoff] process . . . clearly demonstrated a thorough and well-developed approach with job-related outcomes." (JA 2672). Petitioners also knew that Knolls intended to elicit expert testimony from Landy on "[w]hether or not the criteria that [Knolls] used in its RIF were legitimate, non-discriminatory factors" and "whether . . . the criteria are appropriate and were appropriately used. . . ." *Id.*

Following the parties' briefing on the relevance and helpfulness of Landy's testimony, which the trial judge questioned initially, petitioners' motion to preclude was denied and Landy was permitted to testify. As noted in *Meacham II*, Landy testified without contradiction that "the criteria 'criticality' and 'flexibility' were ubiquitous components of 'systems for making personnel decisions,' and that the subjective

components of the IRIF were appropriate because the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." 461 F.3d at 144. In fact, Landy, who was never cross-examined by petitioners, testified that the four criteria used by [Knolls] "form the core of most reasonable and effective systems" and he had not "seen any systems for making personnel decisions in the last couple decades that have not included those four things."

Landy's testimony in this regard and that of the nearly twenty KAPL managers who testified at trial, coupled with literally dozens of trial exhibits, demonstrated "that the specific features of the IRIF challenged by plaintiffs were routinely-used components of personnel decision-making systems in general, and were appropriate to the circumstances that provoked KAPL's IRIF." *Meacham II*, 461 F.3d at 144. This finding by the Second Circuit in *Meacham II* has never been challenged by petitioners on appeal. And, as discussed more fully below, this Court took no issue with this particular finding in *Meacham*.

The Jury Instructions on Disparate Impact

At trial, the parties and the District Court all considered themselves bound by *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and by the Second Circuit's prior decision in *Smith v. Xerox*,

196 F.3d 358 (2d Cir. 1999). *See Meacham v. KAPL*, 185 F. Supp. 2d at 212-213.

In *Smith v. Xerox*, the Second Circuit had previously held that once a plaintiff establishes a *prima facie* case of disparate impact discrimination under the ADEA, only the burden of production shifts to the employer to demonstrate a "business justification" (or "business necessity") for its actions. 196 F.3d at 365. The instructions proposed by Knolls at trial, and the instructions given to the jury, were in full accord with this burden-shifting paradigm, which the Second Circuit and the trial judge had adopted wholesale from *Wards Cove*, 490 U.S. at 643, and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). *See, e.g., Meacham v. KAPL*, 185 F. Supp. 2d at 206, 212-13. Petitioners agreed at trial, and on appeal, that these disparate impact instructions correctly stated the law as it existed at the time in the Second Circuit. *See Meacham II*, 461 F.3d at 148.

It is also undisputed that, at the time of the trial ten years ago, neither the Second Circuit nor the Supreme Court had ever decided that RFOA was an affirmative defense as to which employers carried the burden of persuasion. *See, e.g., Meacham*, 128 S. Ct. at 2400 (observing that this same issue had been taken up in an earlier case from the Ninth Circuit, but "it was not well posed"). Moreover, the regulations from the Equal Employment

Opportunity Commission ("EEOC") existing at the time of trial and still on the books today (*see* 29 C.F.R. § 1625.7(d)) treated RFOA and the "business necessity" test previously applied in the Second Circuit (and at trial in the present case) "as identical." *Meacham*, 128 S. Ct. at 2407 (Scalia, J., concurring in judgment).[2]

Given the law as it existed in the Second Circuit then, and given that petitioners did not challenge at trial Knolls' proof of "reasonableness" regarding the use of criticality and flexibility as factors upon which to rank employees for layoff, it is not surprising that neither Knolls nor petitioners

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[2]In a recently issued notice of proposed rulemaking, the EEOC proposes to amend its RFOA regulations at 29 C.F.R. § 1625.7(d) to conform them to this Court's decisions in both *Meacham* and *City of Jackson*. *See Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act*, 75 Fed. Reg. 7212 (proposed February 18, 2010) (to be codified at 29 C.F.R. Part 1625). However, the EEOC's most recent RFOA proposals are inconsistent with and contrary to the liability-limiting standards of reasonableness laid down by this Court in both of these decisions. Indeed, the proposed regulations attempt to define reasonableness, in part, by asking whether there were "alternatives" available with less of an impact on older workers, and whether there was "unchecked managerial discretion" resulting in the application of "conscious or unconscious age-based stereotypes." *See, e.g.*, newly proposed §§ 1625.7(b)(1)(iv)-(vi) and 1625.7(b)(2).

ever specifically requested a separate instruction to the jury on RFOA, or that no such jury charge or instruction was given by the Magistrate. Indeed, petitioners themselves have previously argued, even after *City of Jackson*, that there was no need for such a specific instruction on "reasonableness" here. (*See* Petitioners' Brief on Remand to Second Circuit Following this Court's Decision in *KAPL v. Meacham*, pp. 10-11) (conceding that "[t]his amounted to a concession that the factors [Knolls] asserted (i.e., the education, work performance, skills, flexibility and criticality) were reasonable, provided they were not influenced by . . . subconscious age bias").

Moreover, given the similarity and substantial overlap between RFOA and "business necessity" (*see Meacham*, 128 S. Ct. at 2404 (observing that these are "two overlapping enquiries")), it is also not surprising that the jury in this case was clearly instructed, *inter alia*, that: (a) "[e]mployers generally possess the right to terminate the employment of employees involuntarily for many reasons," but not due to age (ETT-4725-26), (b) [petitioners] alleged in their disparate impact case "that the practices by which they were selected for termination . . ., while fair on their face, were discriminatory in operation" (ETT-4731); and (c) "[t]he defendants assert[ed] that factors other than the ages of the plaintiffs . . . account[ed] for any statistical deviations . . . . [and] [t]hese factors include . . . the education, work

performance, skills, flexibility and criticality of the plaintiffs as compared to other similarly situated employees" (ETT-4733-34).

During the trial, petitioners never directly questioned or challenged Knolls' substantial showing that criticality and flexibility were legitimate and reasonable non-age factors to use. Rather than fight an unwinnable battle on this issue, petitioners instead chose a wholly different tack. As the Magistrate Judge explained in his disparate impact instructions to the jury, it was at all times the petitioners' argument "that some of these factors [including criticality and flexibility] were themselves influenced by the ages of the plaintiffs."

Knolls has steadfastly maintained throughout this litigation, both at trial and on appeal, that this argument is nothing more than an intentional discrimination argument disguised as a disparate impact claim. Knolls has similarly argued that this "subconscious age bias" argument by petitioners was completely rejected by the jury when it found for Knolls on petitioners' disparate treatment claims.

Knolls' "RFOA" Arguments in Summation

In closing arguments to the jury, Knolls argued that petitioners were terminated due to legitimate non-age factors, including criticality, flexibility, job performance, and company service. (*See* TR 252-254, 4554-65). Thus, as explained in

summation, "a number of factors" – referred to both as "factors other than age" (TR 4557) and as "legitimate, non-discriminatory reasons having nothing to do with age" (TR 4555) – "explain[ed] why the individual plaintiffs were laid off for no reason involving their ages." (TR 4557).

Knolls further argued in summation that the evidence proved that "there were legitimate reasons having to do with criticality, flexibility, company service and performance that account for the layoff, [and] that account for [any] disparity" (TR 4561). And Knolls argued that the undisputed and unimpeached evidence introduced at trial proved that the layoff matrices and factors criticality and flexibility (as well as performance and years of company service) were in fact "used to select, fairly, employees [for layoff] because of legitimate job-related qualifications and criteria." (TR 4562).

In other words, as defense counsel explained to the jury, the unimpeached evidence showed that Knolls "didn't pick this way of selecting people out of a hat" (TR 4563). To the contrary, it was argued, the undisputed evidence proved that "criticality, flexibility and performance were legitimate factors on which to rank everybody and that KAPL used extreme care in developing this system in order to select only those people who were lowest, in terms of their criticality, flexibility, company service and performance." (TR 4563).

The Jury Verdicts on Treatment and Impact

The jury returned its verdict on a Special Verdict Sheet proposed by the trial judge and agreed to by the parties. The jury found for Knolls on the intentional discrimination claims made by all twenty-eight (28) original plaintiffs, finding specifically that petitioners failed to prove that Knolls was motivated by their ages in selecting employees for layoff (on both "pretext" and "mixed motive" theories).

This finding, and the District Court's subsequent judgment and amended judgments in favor of Knolls dismissing petitioners' disparate treatment claims, is no longer open to review or appeal. Petitioners have never suggested otherwise, including in the Petition which they recently filed.

On the disparate impact claims, the jury found for twenty-six (26) of the twenty-eight (28) petitioners. *See Meacham*, 128 S. Ct. at 2399. More specifically, in answer to question 6 of the Special Verdict Sheet, the jury found that petitioners established a prima facie case showing "that a specific employment practice . . . had an adverse impact on [petitioners] because of their age." And on question 7 of the Special Verdict Sheet, the jury found that Knolls failed to "articulate[] a business justification for selecting [petitioners] for termination" in the RIF.

After answering questions 6 and 7 of the Special Verdict Sheet, the jury then answered both question 8 and question 9 (on "willfulness") in favor of petitioners.

KAPL's Rule 50 Motions

At the close of petitioners' case and again after the jury's verdict was returned, Knolls made timely motions for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50(a) and (b).

In its motions under Rule 50(a) and its renewed motion under Rule 50(b), Knolls argued that the petitioners failed to establish a *prima facie* case of disparate impact discrimination. This was based in part on petitioners' repeated admissions at trial that the specific employment practice they were challenging on their disparate impact claim was "the overall layoff selection process." *See Meacham v. KAPL*, 185 F. Supp. 2d at 207-08. Knolls also argued that they had in fact articulated a business justification for petitioners' layoff selections; a justification that was neither contradicted nor impeached by petitioners at trial. (TR 2453-56).

Additionally, Knolls argued in its Rule 50(a) motions that this and other one-sided evidence not requiring any credibility determinations (TR 2455) proved that "managers determined the criticality and the flexibility and performance and . . . continuous service" of employees selected for layoff.

It was also argued that these "nondiscriminatory factors" and "factors other than age" were the only factors "used to determine where [plaintiffs were ranked] on a particular matrix;" and that any "disparity was caused by the procedure . . . used and not by age." (TR 2464-67). Based on these legitimate, non-age factors and the petitioners' failure to either rule them out as the cause of any disparity, or to otherwise prove adverse impact age discrimination under the standards of proof and production then governing such claims in the Second Circuit, Knolls argued that it was entitled to judgment as a matter of law under Rule 50(a).

Similarly, Knolls argued after the jury's disparate impact verdict was returned, pursuant to Rule 50(b), both that: (1) "[t]here was no legally sufficient evidentiary basis for a reasonable jury to find that . . . a specific employment practice, although non-discriminatory on its face, had an adverse impact on [petitioners] due to their ages;" and (2) "[t]here was no legally sufficient evidentiary basis for a reasonable jury to find that defendants did not articulate a business justification for selecting [petitioners] for termination" in the IRIF. (Post-Trial Motion, p. 1). Rather, Knolls argued, "the evidence to the contrary . . . (including . . . the testimony of [KAPL's staffing manager], and other KAPL managers), was overwhelmingly in favor of [Knolls] and was unrebutted by [petitioners] at trial." *Id.*

The court in *Meacham II* found that these motions were sufficiently specific for Knolls not only to preserve, but to prevail upon, its RFOA defense, as a matter of law. *See Meacham II*, 461 F.3d at 146 n.9 (correctly holding that Knolls never "waived [its] argument that [its] business judgment was reasonable." and granting Knolls' motion under Rule 50(b) because, while "[t]here may have been other reasonable ways for [Knolls] to achieve its goals . . ., the one selected was not unreasonable").

The Magistrate's Denial of Knolls' Rule 50(b) Motion on Petitioners' Impact Claims

On February 13, 2002, the District Court issued a decision denying Knolls' post-trial motion for judgment as a matter of law as to petitioners' disparate impact claim. In the course of its decision, the court found that the non-age factors criticality and flexibility, as well as job performance, "required the application of objective standards in various categories." *Meacham v. KAPL*, 185 F. Supp. 2d at 208. Thus, "[f]or example, advanced degrees, training and prior experience were considered for flexibility and criticality." *Id.* n.17.

Nevertheless, in an opinion written by the Magistrate Judge who tried the case, the court rejected every argument Knolls made in support of its Rule 50(b) motion on petitioners' disparate impact claim, except one. On this last argument (i.e., based on Knolls' contention that the jury's

finding against it on the sufficiency of its business justification was plainly and clearly erroneous), the Magistrate Judge sided with Knolls. *See Meacham v. KAPL*, 185 F. Supp. 2d at 212-213 (holding that Knolls "met its burden of production" by demonstrating "a legitimate business justification for the challenged employment practice"). According to the Magistrate, whose decision on this issue was upheld both in *Meacham I* and *Meacham II*, "[t]he business justification offered by defendants was the budgetary need to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions. . . . The presentation of this justification sufficed to satisfy [Knolls'] burden of production." *Id.* at 213.

Given this latter finding, the Magistrate Judge was compelled to hold that the jury's finding to the contrary was erroneous. Nevertheless, the Magistrate denied Knolls' Rule 50(b) motion finding that "[t]he jury's findings at the third and final stage obviated the error made on [Knolls'] burden of production and rendered that error harmless." *Id.* at 214.

The Second Circuit's Decision in *Meacham I*

After the denial of their Rule 50(b) motion, Knolls filed a timely appeal to the Second Circuit from the final judgment of the District Court. In a unanimous opinion, the Second Circuit found, "as the district court ruled, [that] [Knolls] offered a

facially legitimate business justification for the IRIF and its constituent parts: 'to reduce its workforce while still retaining employees with skills critical to the performance of KAPL's functions.'" *Meacham v. KAPL*, 381 F.3d 56, 74 (2d Cir. 2004) ("*Meacham I*").

Significantly, *Meacham I* correctly held that "[u]nchallenged, KAPL's justification would preclude a finding of disparate impact." *Id.* However, the panel then re-constructed and re-cast petitioners' adverse impact arguments at trial and determined that the jury might have found that "unchecked managerial bias and subjectivity" was "one basic flaw in the IRIF process," and that this was the specific discriminatory practice identified at trial by petitioners. In reality, this was not the case at trial, where petitioners repeatedly asserted that it was "the overall layoff selection process" that caused a disparate impact.

In any event, the court in *Meacham I* then concluded that "[a]t least one suitable alternative is clear from the record: KAPL could have designed an IRIF with more safeguards against subjectivity, in particular, tests for criticality and flexibility that are less vulnerable to managerial bias." 381 F.3d at 75. Of course, any such "alternative" is inconsistent with the subsequent decision of this Court in *Meacham*. *See* 128 S. Ct. at 2405 n.14 (where this Court reaffirmed *City of Jackson's* teaching that "[u]nlike the business necessity test, which asks whether

there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement").

The EEOC's most recent proposed regulations on the RFOA defense are likewise sharply at odds with both *Meacham* and *City of Jackson* in this latter regard. *See, e.g.*, newly proposed 29 C.F.R. § 1625.7(b)(1)(iv)-(vi) and 1625.7(b)(2). Thus, no deference at all should be afforded to these aspects of the EEOC's proposals.

This Court's Granting of Knolls' Petition for a Writ of Certiorari in 2005

Knolls timely petitioned this Court for a writ of certiorari, seeking review and reversal of the judgment in *Meacham I*. On April 5, 2005, this Court granted Knolls' petition, vacated the judgment in *Meacham I*, and remanded the case for further consideration in light of *City of Jackson*. *See Meacham v. KAPL, Inc.*, 544 U.S. 957 (2005).

It was in *City of Jackson* where the Supreme Court first held that disparate impact claims are cognizable under the ADEA. 544 U.S. at 230-31. It was also in *City of Jackson* that:

> [T]he Supreme Court held that the 'business necessity' test [previously applied in this Circuit to adverse

> impact claims under the ADEA, and applied at the trial in this case] is not applicable in the ADEA context: rather, the appropriate test is for 'reasonableness,' such that the employer is not liable under the ADEA so long as the challenged employment action, in relying on specific non-age factors, constitutes a reasonable means to the employer's legitimate goals.

Meacham II, 461 F.3d at 140.

Just as importantly, in light of the RFOA provision of the ADEA and certain "textual differences between the ADEA and Title VII" of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), this Court in *City of Jackson* made it clear that "the scope of disparate impact liability under the ADEA is narrower than under Title VII." 544 U.S. at 240. "Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Id.* at 241.

The Second Circuit's Decision in *Meacham II*

In *Meacham II*, the same three-judge panel reconsidered *Meacham I* and the trial evidence in light of the "reasonableness" test and narrower scope of liability announced in *City of Jackson*. After correctly holding that the Second Circuit's prior

precedent in *Smith v. Xerox Corp.*, *supra*, "is no longer good law insofar as it holds that the 'business necessity' test governs ADEA disparate-impact claims," the *Meacham II* majority reversed *Meacham I* and granted appellants' Rule 50(b) motion for judgment as a matter of law.

As a result of this decision, the case was remanded to the district court with directions to issue an order dismissing petitioners' disparate impact claims.

Subsequent Appellate History

Thereafter, petitioners filed their first petition for a writ of certiorari with this Court on an issue they never raised at trial, and that was only raised in these proceedings in an amicus brief filed by the EEOC with the Second Circuit following this Court's remand in *KAPL v. Meacham, supra*. Then, on June 19, 2008, after this Court granted the petition solely on the issue of whether RFOA is an affirmative defense under the ADEA, the Court vacated the judgment in *Meacham II* and remanded the case for further proceedings consistent with the Supreme Court's Opinion in *Meacham*.

On remand, the Second Circuit first asked the parties how it should proceed in light of the Opinion in *Meacham* vacating the judgment in *Meacham II*. Knolls argued in response that the Court of Appeals should "apply[] the law recently articulated by the

Supreme Court to the facts of this case" and "again grant defendants' motion for judgment as a matter of law, pursuant to Fed. R. Civ. P. 50." (cite). Knolls also argued that the court should "dismiss the [petitioners'] disparate impact claims in their entirety based on the unimpeached and uncontested evidence of reasonableness introduced at trial by" Knolls. *Id.*

The Second Circuit rejected this and other arguments made on remand by Knolls (and by the petitioners) and remanded the case to the district court with directions to decide four issues. *Meacham v. KAPL, Inc.*, 305 Fed. Appx. 748 (2d Cir. 2009). The district court found in response, after extensive briefing and oral arguments from the parties, that Knolls had knowingly and intentionally waived its RFOA defense at trial, and the waiver could not be excused. Because of these holdings, the Magistrate Judge never considered the specific issue that was remanded in *Meacham* – whether Knolls is entitled to judgment as a matter of law in light of this Court's Opinion in *Meacham*. Instead, the Magistrate reinstated his prior judgment in favor of petitioners. *See Meacham v. KAPL, Inc.*, 627 F. Supp. 2d 72 (N.D.N.Y. 2009).

Knolls timely appealed these rulings to the Court of Appeals. In a unanimous decision, a new panel of the Second Circuit reversed the Magistrate's decision on waiver, and vacated the judgment of the

district court, finding that this Court's opinion and mandate in *Meacham* precluded reconsideration of petitioners' previous arguments (made before both this Court and the Second Circuit in *Meacham II*) that Knolls had waived, abandoned, and/or forfeited their RFOA defense.

Although Knolls maintains that this was the correct decision on the issue of waiver, the Court of Appeals failed to answer the specific question remanded by this Court in *Meacham*. Instead, the Second Circuit has ordered additional discovery and a new trial on liability based on what the panel's Summary Order characterizes as "uncertainty and multiple changes in the governing law complicat[ing] the issues in this case."

On January 4, 2010, Knolls timely filed a Petition for Rehearing *En Banc*, which was denied on February 23, 2010.

REASONS FOR GRANTING THE PETITION

This Case and the Questions Presented Are of Exceptional National Importance

This is a case of considerable national importance to employers (and employees) across the country. *See* Daniel B. Kohrman, *The ADEA at 40: The Supreme Court Confronts Old Age*, 42 Clearinghouse Rev. 463, 465 (January/February 2009) (describing the Supreme Court's ruling in *Meacham* as "[t]he most important Supreme Court age-bias decision of 2008"); *Michael G. Cleveland on Meacham v. Knolls Atomic Power Laboratory*, 2008 Emerging Issues 2560 (July 16, 2008) (noting that "[t]he Court's decision is particularly significant with workforce reductions being daily front-page news in today's troubled economy" and that "[t]he Second Circuit's handling of the case on remand will likely provide the first significant interpretation of the Court's *Meacham* decision" and "[i]ts decision should and will be closely monitored by employers").

For these and certain other pragmatic as well as policy reasons discussed below, this conditional cross-petition should be granted in its entirety, and the Court should decide this dispute once and for all on the merits in Knolls' favor, as a matter of law. *See* Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 Santa Clara L. Rev. 997, 101 (2009) (suggesting that "[t]wo key values that . . . influence the outcomes of business cases are

the preference for a uniform set of legal rules, and for laws and regulations that produce predictable results"); *see also Cleveland on Meacham*, 2008 Emerging Issues 2560 (noting that "[i]f the record in *City of Jackson* was adequate for the Court to make such a determination, one might expect that the record in *Meacham*, after a full trial, would be adequate for such a purpose as well").

Indeed, given the Second Circuit's Summary Order and failure to do what was directed by this Court on remand, this case cries out for the Supreme Court's supervision and intervention in carrying out *Meacham's* mandate. Only this, and deciding once and for all that Knolls has proved that the non-age factors in question here are reasonable as a matter of law, will ensure greater predictability and uniformity in the lower courts' application of the RFOA standards set down in *Meacham* and *City of Jackson*. *Compare Ontario v. Quon*, No. 08-1332, ___ U.S. ___ (June 17, 2010) (determining "reasonableness" of public employer's search of an employee's pager messages, as a matter of law, where the trial evidence showed that search was based on legitimate work-related reasons).

Moreover, the questions presented by this cross-petition involve lingering issues of exceptional importance (both in and outside of the Second Circuit) concerning the proper application of the liability-limiting principles expressed by Congress in

the ADEA's RFOA provision, and by this Court in *Meacham* and *City of Jackson*. These important questions, each of which the Court's mandate in *Meacham* required the Court of Appeals to consider and decide on remand, include: (a) whether the record facts of this long-running case satisfy the standards of "reasonableness" articulated in *Meacham* and *City of Jackson;* (b) whether Knolls satisfied its burden of persuasion on the RFOA defense based on the extensive existing trial record, as a matter of law; and (c) whether the outcome reached in *Meacham II* should be any different when the burden of persuasion on the RFOA defense is properly placed on Knolls.

The exceptional importance of the answers to these questions is demonstrated, *inter alia*, by the fact that this Court has twice vacated the Second Circuit's judgments in this case, both times remanding this case with certain specific instructions for further consideration. It is also demonstrated by the arguments of *amici* who have expressed interest in this case, by the extensive commentary which the *Meacham* decision has generated, and by the EEOC's most recent regulatory proposals on the RFOA defense.

As discussed below, the Second Circuit's recent conclusion that this Court's opinions in *Meacham* and *City of Jackson* have caused such uncertainty and complications in the governing law

as to make it impossible for the lower court(s) to decide the burden of persuasion question as a matter of law, as if on summary judgment, also conflicts with authoritative decisions from other circuit courts of appeal. *See, e.g., Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 404 (6th Cir. 2008) (affirming the grant of summary judgment to employer on its RFOA defense and noting that "*Meacham* clarified" certain "questions remain[ing] about the nature of" the RFOA provision after *City of Jackson*).

Finally, the Summary Order and the Court of Appeals' failure to decide whether Knolls satisfied its burden of persuasion on the question of "reasonableness" is inconsistent with the standards articulated by this Court in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000), and other cases decided by this Court, including *Quon, supra* (deciding "reasonableness" issue as a matter of law, but in a different, constitutional context).

The Summary Order Conflicts With and Fails to Fully Execute the Mandate in *Meacham*

On the specific burden of persuasion question left open and remanded by this Court in *Meacham*, Knolls agrees with petitioners' arguments that this Court may correct the Court of Appeals' misconstruction of the mandate and opinion in *Meacham*. *See* Petition, p. 28 (and cases cited therein). Albeit for different reasons, Knolls also agrees with petitioners that, in the present case, "the

factual record is adequate, and would not be improved by a remand to the court of appeals," or by a new trial, and that "the straightforward question" left open by the Court in *Meacham* should be decided by this Court "by a straightforward application of controlling precedent" (Petition, p. 29) and as a matter of law, but in Knolls' favor. .

In *Meacham*, this Court held, for the very first time since the ADEA was enacted in 1967, that an employer defending against a disparate impact claim under the ADEA must not only produce evidence raising the RFOA defense, but also persuade the factfinder of its merit. 128 S. Ct. at 2398. At the same time, the Court reaffirmed that the RFOA clause in the ADEA "significantly narrow[ed] its coverage" to preserve a fair degree of leeway for employment decisions with effects that correlate with age. *Id.* at 2406.

This Court also noted in *Meacham* that the Second Circuit in *Meacham II* "showed no hesitation in finding that *Knolls prevailed on the RFOA defense*, though the court expressed its conclusion in terms of [plaintiffs'] failure to meet the burden of persuasion." *Id.* (emphasis added). Because the Court disagreed with this placement of the burden on plaintiffs (and no other aspect of the decision in *Meacham II*), the Court vacated the judgment and remanded the case for a determination as to "[w]hether the outcome [in *Meacham II*] should be

any different when the burden is properly placed on the employer. . . ." *Id.* at 2406-07.

The Opinion in *Meacham* also made three other important observations, each apparently ignored or not taken into account by the panel below in failing to answer the specific question remanded. First, "[t]he focus of the [RFOA] defense is that the factor relied upon was a 'reasonable' one for the employer to be using." *Id.* at 2403. Second, the "burden of persuasion answers 'which party loses if the evidence is closely balanced'" and "'[i]n truth, however, very few cases will be in evidentiary equipoise.'" *Id.* at 2406 (quoting *Schaffer v. Weast*, 546 U.S. 49, 56 (2005)). And third, "the more plainly reasonable the employer's 'factor other than age' is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious." *Id.*

Moreover, the unpublished Summary Order recently issued in this case effectively and needlessly overturns, *sub silentio*, certain prior holdings and findings in both *Meacham II* and *Meacham I* which were not in fact overturned or affected by this Court's decision in *Meacham*.

For example, *Meacham* did not disturb or overturn cast doubt upon the majority holdings in *Meacham II* that: (1) "[t]he range of reasonable personnel systems is wide in a fluid and adaptive

economy" (461 F.3d at 144); (2) while "[t]here may have been other reasonable ways for [KAPL] to achieve its goals (as we held in *Meacham* [I], 381 F.3d at 75), . . . 'the one selected was not unreasonable'" (*id.* at 146); and (3) "there are reasonable and permissible employment criteria that correlate with age" and "[t]his case is a fine example of the phenomenon." (*id.* at 143). This Court's opinion in *Meacham* also did not disagree with or cast doubt upon *Meacham II*'s findings that "that the criteria of 'criticality' and 'flexibility' were ubiquitous components of 'systems for making personnel decisions,' and that the subjective components of the IRIF were appropriate . . . ." *Id.* at 144.

Nor did this Court in *Meacham* disagree or take issue with *Meacham II's* holding that "[t]his evidence unquestionably discharged defendants' burden of production . . . suggest[ing] that the specific features of the IRIF challenged by plaintiffs were routinely-used components of personnel decision-making systems in general, and were appropriate to the circumstances that provoked KAPL's IRIF." *Id.* As also correctly explained in both *Meacham II* and *Meacham I*, but apparently overlooked in the Summary Order, Knolls unquestionably "offered a facially legitimate business justification for the IRIF and its constituent parts: 'to reduce its workforce while still retaining employees with skills critical to the performance of

KAPL's work." *Id.* at 140. As also observed correctly in *Meacham II*, the trial "[e]vidence supports [appellants'] business objective" (*id.* at 143), and "KAPL set standards for managers constructing matrices and selecting employees for layoff" and those standards "restricted arbitrary decision-making by individual managers." *Id.* at 145-46.

The Supreme Court's decision in *Meacham* does not overturn or cast doubt upon any of these still-valid holdings and findings, for it only reversed the *Meacham II* panel majority's holding that the ADEA's RFOA defense is not an affirmative defense and that petitioners bore the burden of proving unreasonableness. As the Summary Order correctly notes, however, the Supreme Court observed in *Meacham*, *inter alia*, that this Court "showed no hesitation in finding that [appellants] prevailed on the RFOA defense, though the court expressed its conclusion in terms of [appellees'] failure to meet the burden of persuasion." 128 S. Ct. at 2406.

This language, and a review of the entire Opinion in *Meacham*, indicates that the Supreme Court disagreed only with the latter finding on the issue as to which party bore the burden of proof on the RFOA defense, but had no problem accepting *Meacham II*'s ultimate findings on the reasonableness of the non-age factors at issue here.

Furthermore, reversal of the Summary Order is warranted because the Order conflicts and is

inconsistent with Congress' intent in adding the RFOA clause to the ADEA and with the clear standards of "reasonableness" recently set down by this Court in *Meacham* and *City of Jackson*. As reaffirmed in *Meacham*, Congress put the RFOA clause in the ADEA to "significantly narrow its coverage" and to preserve a fair degree of leeway for employment decisions with effects that correlate with age. *Id.* Accordingly:

> [t]he focus of the [RFOA] defense is that the factor relied upon was a "reasonable" one for the employer to be using (SPA-193) . . . [and] the more plainly reasonable the employer's "factor other than age" is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious.

Id. at 2404-06.

As a matter of law, this is just such a "short-step" case because the non-age factors relied upon by Knolls are not obscure, but plainly reasonable, as amply demonstrated by the evidence already contained in the existing trial record.

The Summary Order Conflicts With Decisions in Other Circuits on Similar Questions

The Second Circuit's Summary Order conflicts with the decisions of other circuit courts of appeal in

ordering a new trial in this case and in refusing to determine, on the existing trial record, whether the layoff factors at issue here are reasonable non-age factors, as a matter of law. Indeed, on less of a factual record than the one that already exists in the present case, other circuit courts have not hesitated to grant summary judgment to employers on the same or similar issues based on the clear existence of RFOA. *See, e.g., Allen v. Highlands Hosp. Corp.*, 545 F.3d 387, 404 (6th Cir. 2008) (noting that "*Meacham* clarified" certain "questions remain[ing] about the nature of" the RFOA provision after City of Jackson); *Summers v. Winter*, 303 Fed. Appx. 716 (11th Cir. 2008) (affirming summary judgment where "the Navy's decision to implement [a new] training program was in response to the September 11 terrorist attacks" and this was "a decision based on a reasonable non-age factor"). *See also Pippin v. Burlington Res. Oil and Gas Co.*, 440 F.3d 1186 (10th Cir. 2006) (RIF decisions based on "[c]orporate restructuring, performance-based evaluations, retention decisions based on needed skills, and recruiting concerns are all reasonable business considerations"); *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603, 607-08 (9th Cir. 2005) (affirming summary judgment where "many managers made employment termination decisions based upon the reasonable and diverse business needs of different departments within the corporation").

Unlike the Second Circuit's Summary Order here, none of these decisions have found that this Court's decisions in *City of Jackson* and/or *Meacham* have created "uncertainty" or "complicated the issues . . . . to such an extent that neither party is entitled to judgment as a matter of law." In fact, these and other lower court decisions issued both before and after *Meacham* was decided demonstrate that just the opposite is true. *See, e.g., Aldridge v. City of Memphis*, No. 05-2966, 2008 U.S. Dist. LEXIS 67539, at *26-27 (W.D. Tenn. July 31, 2008) (citing *Meacham* in affirming summary judgment where no "genuine issues of material fact exist as to whether [d]efendant's RFOA's were reasonable"); *Gambill v. Duke Energy Corp.*, No. 1:06-CV-00724, 2009 U.S. Dist. LEXIS 83126, at *24-26 (S.D. Ohio Sept. 10, 2009) (same); *Magnello v. TJX Cos., Inc.*, 556 F. Supp. 2d 114, 123 (D. Conn. 2008) (employer's practice of recruiting recent college graduates for a training program with entry-level pay was "appropriate and reasonable"); *Gallagher v. The IBEW Local Union No. 43*, No. 5:00CV1161, 2008 U.S. Dist. LEXIS 81615 (N.D.N.Y. Oct. 15, 2008) (citing *Meacham* and finding that exceptions to union referral procedures based on special skills were based on reasonable factors other than age); *Adams v. Lucent Techs., Inc.*, No. 2:03cv300, 2007 U.S. Dist. LEXIS 662, at *23-24 (S.D. Ohio Jan. 3, 2007) (decisions by employer were based on reasonable factors other than age, as a matter of law), *aff'd*, 284 Fed. Appx. 296 (6th Cir. 2008);

Aliotta v. Bair, 576 F. Supp. 2d 113, 127-28 (D.D.C. 2008) (same); *Embrico v. United States Steel Corp.*, 404 F. Supp. 2d 802, 829-31 (E.D. Pa. 2005) (same), *aff'd*, 245 Fed. Appx. 184 (3d Cir. 2007). *And compare Suslovic v. Black & Decker, Inc.*, No. 1:06CV116, 2007 U.S. Dist. LEXIS 53055 (N.D. Ohio July 23, 2007) (citing *Meacham II* and holding that employer was entitled to use subjective criteria in a RIF "to assemble what was, in its opinion, the best team of service center managers available"), *aff'd*, 300 Fed. Appx. 393 (6th Cir. 2008).

Significantly, each of these cases resolved similar RFOA liability disputes on summary judgment, as a matter of law, and without the need for a trial, just as was done in *City of Jackson*. And, in stark contrast to the Second Circuit's recent Summary Order, the uniformity of these decisions compels the conclusion that the law as it currently stands has not been complicated or rendered uncertain by the Supreme Court's recent pronouncements on the RFOA defense, as the panel's Summary Order erroneously concludes. Instead, the law has been clarified and simplified by the Supreme Court in an effort to effectuate Congress's intent to significantly narrow the scope of liability for disparate impact discrimination under the ADEA.

But now, the Second Circuit's Summary Order, in ordering a new trial and failing to determine whether the factors here in question were

reasonable non-age factors for Knolls to use, as matter of law, has departed from what had been a uniformity of approach both in and outside of the Second Circuit following *City of Jackson* and *Meacham*. Only this Court can resolve this conflict among the circuits and restore uniformity without the need for a new trial here.

The Summary Order Conflicts With *Reeves* and Other Supreme Court Cases

In *Reeves*, the Supreme Court explained that:

> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's *prima facie* case..., and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as matter of law.

530 U.S. 133, 148-49 (2000).

Like the district court did on remand, the Summary Order here in question ignores these issues, including petitioners' failure to establish a prima facie disparate impact case as required by this Court's precedents. *See, e.g., Meacham*, 128 S. Ct. at 2406 (noting this is a requirement that "has bite"). Similarly, in refusing to grant judgment as a matter of law to Knolls on the RFOA defense, the Second

Circuit's Summary Order fails to heed this Court's admonition in *Reeves* that "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if . . . there was abundant and uncontroverted independent evidence that no discrimination had occurred." 530 U.S. at 148.

Here, the existing trial record conclusively reveals that petitioners were selected for layoff in the RIF not based on their ages, but based on their flexibility and criticality, as well as their performance and prior service to Knolls. These non-discriminatory reasons are reasonable factors other than age, as a matter of law.

The decision in *Reeves*, together with the liability-limiting language articulated by the Court in both *Meacham* and *City of Jackson*, indicates that the Second Circuit, or the district court, rather than a jury, could have and should have properly decided as a matter of law under Rule 50(b) that the unimpeached proof of reasonableness introduced by Knolls at trial satisfied its burden of persuasion. And, as demonstrated by this Court's decision in *City of Jackson* (and in a somewhat different context more recently in *Ontario v. Quon, supra)*, in a proper case the question of "reasonableness" can and should be decided by this Court, as a matter of law. This is just such a case.

In short, only one conclusion can be reached in this case given the undisputed and unimpeached evidence amassed by Knolls at trial related to the legitimacy and reasonableness of criticality and flexibility as factors upon which to rank petitioners for layoff, given the fact that petitioners were plainly on notice of Knolls' RFOA defense from the time an Answer was filed until the time of trial, and given that petitioners have conceded that both Knolls' objectives and the non-age layoff factors in question here are "undoubtedly reasonable" and that "defendants presented evidence regarding the reasonableness of their practices" at trial. That conclusion, this Court should find as a matter of law, is that the existing record evidence satisfies Knolls' burden of proving that criticality, flexibility, job performance, and company service are reasonable non-age factors in the circumstances of this case, as a matter of law, and no new trial on liability is therefore needed.

This conclusion is not and cannot be undermined or altered by petitioners' claims that the reasonable non-age factors here in question were affected by "subconscious age bias," a disparate treatment argument rejected by the jury, or by the existence of alternative factors with less of a disparate impact, as the EEOC would have it in their newly proposed RFOA regulations.

On the record already before this Court in *Meacham*, and before the Court of Appeals and the District Court on remand, no reasonable jury could find otherwise, particularly since "everyone knows that the choice of a practice relying on a 'reasonable' non-age factor is good enough to avoid liability." *Meacham* 128 S. Ct. at 2405.

CONCLUSION

This Conditional Cross-Petition should be granted for all of the reasons set forth herein.

Dated: July 1, 2010

Respectfully submitted,

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171

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No. 10-36

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KNOLLS ATOMIC POWER LABORATORY *et al.*,

Cross-Petitioners,

v.

CLIFFORD B. MEACHAM *et al.*,

Cross-Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit violated this Court's mandate in holding that judgment as a matter of law would be inappropriate to remedy plaintiffs' alleged failure to rebut a defense that defendants never pressed at trial.
2. Whether the Second Circuit's non-precedential summary order requiring a retrial in light of the unusual developments in this particular case creates a circuit conflict worthy of certiorari.
3. Whether employees can defeat an employer's "reasonable factors other than age" defense under the Age Discrimination in Employment Act by showing that although the employer's goals were reasonable, it pursued them in an unreasonable manner, in that it unnecessarily allowed age bias to affect the selection of workers for termination.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
INTRODUCTION 1
STATEMENT 2
REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION 5
I. Defendants' Objections To The Court Of Appeals' Implementation Of This Court's Mandate Are Meritless. 5
II. The Court Of Appeals' Decision To Remand For A New Trial Rather Than To Enter Judgment As A Matter Of Law Does Not Warrant Review. 7
III. The Third Question Presented Was Not Decided Below And Does Not Merit Review. 10
CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Allen v. Highlands Hospital Corporation,
545 F.3d 387 (6th Cir. 2008) 7, 8

Balt. & Carolina Line v. Redman,
295 U.S. 654 (1935) 12

Capital Cities Cable, Inc. v. Crisp,
467 U.S. 691 (1984) 11

Cone v. W. Va. Pulp & Paper Co.,
330 U.S. 212 (1947) 6, 11, 12

Durante v. Qualcomm, Inc.,
144 Fed. Appx. 603 (9th Cir. 2005) 8

Meacham v. Knolls Atomic Power Lab.,
128 S. Ct. 2395 (2008) 3, 13

Meacham v. Knolls Atomic Power Lab.,
381 F.3d 56 (2d Cir. 2004) 2, 3

Meacham v. Knolls Atomic Power Lab.,
461 F.3d 134 (2d Cir. 2006) 3, 4, 6

Pippin v. Burlington Resources Oil & Gas Co.,
440 F.3d 1186 (10th Cir. 2006) 8

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133, 150 (2000) 9

Smith v. City of Jackson,
544 U.S. 228 (2005) 3, 8, 9

Summers v. Winter,
303 Fed. Appx. 716 (11th Cir. 2008) 8

Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.,
546 U.S. 394 (2006) 13

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 10

Watson v. Fort Worth Bank & Trust,
487 U.S. 977 (1988) 11

Rules

Fed. R. Civ. P. 50(b)(2)-(3) 6

INTRODUCTION

The district court found that defendants knowingly and deliberately abandoned their "reasonable factors other than age" (RFOA) defense prior to trial, a finding the Second Circuit did not question on appeal. The court of appeals nonetheless refused to enforce that waiver and instead ordered a new trial to allow defendants a second chance to assert their waived defense. For the reasons set forth in plaintiffs' petition, the Second Circuit's reversal of the district court's waiver ruling was based on a misconstruction of this Court's mandate and should be reversed.

Defendants seek to compound that error through their conditional cross-petition. Having persuaded the court of appeals to overlook their waiver, defendants are not satisfied with an opportunity to assert their defense for the first time at a new trial. Instead, they insist that they have a right to immediate judgment as a matter of law on the basis of a defense that they never raised at trial and that plaintiffs never had an opportunity to counter. They cite no precedent for such a plainly unfair course of action, much less a conflict of authority. Nor do they provide any other plausible basis for certiorari in their cross-petition.

STATEMENT

The facts and the long history of this case are discussed in detail in this Court's prior decision, the decisions of the lower courts, and in plaintiffs' pending petition. *See* Pet. 4-15.[1] We will not repeat them here. However, plaintiffs are compelled to correct several aspects of defendants' description of the record.

First, defendants repeatedly assert that the evidence regarding the reasonableness of their conduct was undisputed. *See, e.g.*, Cross-Pet. 7, 13, 42. While it is true that many of the historical facts of the case are uncontested, it is not true that plaintiffs ever conceded that defendants' practices were reasonable. To the contrary, because defendants failed to present an RFOA defense at trial, the reasonableness of their practices simply was not at issue. Absent assertion of the RFOA defense, it was sufficient, under the jury instructions defendants themselves proposed, for plaintiffs to demonstrate that defendants' specific employment practices had a disparate impact on older workers and that defendants could have avoided that impact through equally effective, less discriminatory methods. That is what plaintiffs did. *See Meacham v. Knolls Atomic Power Lab.*, 381 F.3d 56, 75 (2d Cir. 2004) (affirming jury's findings in plaintiffs' favor). Defendants attempted to raise an RFOA defense for the first time on appeal, five years after the trial. When they presented this newfound defense,

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[1] "Pet." and "Pet. App." refer to plaintiffs' petition and petition appendix in No. 09-1449. "Cross-Pet." refers to defendants' conditional cross-petition in No. 10-36.

plaintiffs directly contested any assertion that defendants had reasonably conducted their involuntary reduction in force. *See, e.g.*, C.A. Reply Br. for Plaintiffs-Appellees-Cross-Appellants at 5-9, *Meacham v. KAPL, Inc.*, 381 F.3d 56 (2d Cir. 2004) (No. 02-7378) (2004 C.A. Reply Br.).

Similarly, plaintiffs' agreement that retaining flexible workers with critical skills was a reasonable goal is not a concession that plaintiffs were terminated on the basis of "reasonable factors other than age." *Cf., e.g.*, Cross-Pet. 11, 13, 15 (implying otherwise).[2] The specific employment practice plaintiffs challenged – and, therefore, the aspect of their conduct defendants were required to prove reasonable in order to avoid liability, *see Smith v. City of Jackson*, 544 U.S. 228, 242 (2005) – was defendants' "unaudited and heavy reliance on subjective assessments" to determine which workers were truly flexible and possessed critical skills. *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 139 (2d Cir. 2006), *rev'd on other grounds*, 128 S. Ct. 2395 (2008). Plaintiffs plainly did not concede that it was reasonable for defendants to rely on unaudited subjective assessments to decide which workers were flexible and had critical skills.

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[2] Defendants suggest that the jury was not instructed on the RFOA defense because plaintiffs had conceded the reasonableness of their conduct. Cross-Pet. 13-14. That is untrue. Indeed, if plaintiffs had conceded that defendants had a valid RFOA defense, there would have been no need for any jury instructions at all because the case would have ended with that concession. In fact, the jury was not instructed on RFOA because defendants had abandoned the defense prior to trial. *See* Pet. App. 15a-20a.

Finally, although plaintiffs had no reason to address reasonableness at trial, the evidence they presented on other issues was sufficient to allow a jury to conclude that defendants' implementation of their reduction in force was unreasonable. *See, e.g.*, C.A. Brief for Appellees at 54-57; 2004 C.A. Reply Br. at 5-9; *Meacham*, 461 F.3d at 145 (describing plaintiffs' expert's testimony that "the procedures established for review of the decisions made by individual managers 'did not offer adequate protections to keep the prejudices of managers from influencing the outcome'") (citation omitted); *id.* at 144-45 (describing how defendants failed to implement the safeguards they themselves had determined to be reasonable to guard against the risk that managers' subjective assessments would give effect to age bias). Thus, Judge Pooler rejected the idea that a jury which "had been properly charged that defendants bear the burden of proving a RFOA would necessarily find for defendants. Such a jury could permissibly find that defendants had not established a RFOA based on the unmonitored subjectivity of KAPL's plan as implemented." *Id.* at 153 (Pooler, J., dissenting).

Of course, had they been given the opportunity to directly address defendants' RFOA defense at trial, plaintiffs would have done much more, asking their expert to address the question more directly and vigorously cross-examining defendants' experts and witnesses on a question that has only now become important. The court of appeals rightly concluded that plaintiffs were due at least that opportunity. Pet. App. 4a.

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

Defendants' conditional cross-petition asks this Court to review three questions, none of which merits the Court's attention.

I. Defendants' Objections To The Court Of Appeals' Implementation Of This Court's Mandate Are Meritless.

Defendants first argue that this Court ordered the court of appeals to decide solely whether defendants were entitled to judgment as a matter of law on the basis of their RFOA defense, and that the decision below conflicted with that limited remand. Although plaintiffs agree that any misconstruction of the mandate would warrant correction, *see* Pet. 16-17, defendants' objection to the court of appeals' construction of the mandate is meritless.

First, as discussed in plaintiffs' petition, this Court issued its ordinary, open-ended mandate, which allowed the court of appeals to consider any question not decided by this Court. *See* Pet. 17-22.

Second, even if this Court had limited the court of appeals to deciding whether judgment as a matter of law should be issued on the basis of defendants' RFOA defense, the court of appeals *did* decide that question, concluding that defendants were not entitled to judgment as a matter of law because of "uncertainty and multiple changes in the governing law," Pet. App. 4a. To be sure, the court of appeals did not decide whether defendants had established an RFOA defense on the pre-existing trial record. But it was not required to do so: Even if defendants had shown that the evidence was insufficient to rebut

their defense, the court of appeals was nonetheless entitled to conclude that the only proper remedy was a retrial. *See* Fed. R. Civ. P. 50(b)(2)-(3) (allowing court to remedy insufficiency of the evidence by either "direct[ing] entry of judgment as a matter of law" or "order[ing] a new trial"). As this Court has explained, "there are circumstances which might lead the trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice." *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 215 (1947). In this case, the court of appeals recognized that if changes in the legal landscape excused defendants' failure to present an RFOA defense at trial,[3] justice would best be served by a new trial at which defendants could present, plaintiffs could contest, and a jury could decide the validity of defendants' RFOA defense in the first instance.[4]

While defendants may disagree with the court of appeals' decision to order a new trial rather than to rule itself on the RFOA defense, they cannot reasonably claim that this Court's mandate foreclosed it.

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[3] The district court properly found that there were no such changes and that defendants' failure to present their RFOA defense at trial could not be excused. *See* Pet. App. 32a-33a.

[4] Thus, the Second Circuit's refusal to examine the current trial record only hurt plaintiffs, not defendants. When Judge Pooler reviewed the existing evidence using the correct burdens of persuasion, she properly concluded that defendants had not met their burden of demonstrating that no reasonable juror could have rejected an RFOA defense on the present record. *See Meacham*, 461 F.3d at 153 (Pooler, J., dissenting); *see also* C.A. Br. for Appellees at 52-57.

II. The Court Of Appeals' Decision To Remand For A New Trial Rather Than To Enter Judgment As A Matter Of Law Does Not Warrant Review.

Defendants next assert that the Second Circuit's decision to remand the case for a new trial created a certworthy conflict, apparently over the circumstances in which a court of appeals may resolve an RFOA defense on a pre-existing trial or summary judgment record. *See* Cross-Pet. 36-40. That claim is baseless.

1. Defendants point out that other courts, in various circumstances, have awarded defendants summary judgment or judgment as a matter of law on RFOA defenses. Cross-Pet. 36-40. The opinion below does not establish any principle of law in conflict with those decisions. The Second Circuit did not hold, as a general matter, that RFOA can never be established as a matter of law. It simply concluded that in this particular case, where the record at trial was developed in the absence of any asserted RFOA defense, it would be inappropriate to order judgment as a matter of law without permitting plaintiffs an opportunity to rebut the defense their employer withheld from the jury at trial.

None of the decisions defendants cite confronted such a question, much less reached a contrary conclusion. For example, defendants claim that *Allen v. Highlands Hospital Corporation*, 545 F.3d 387 (6th Cir. 2008), conflicts with the decision in this case because it affirmed a grant of summary judgment in favor of an employer even though the district had wrongly viewed RFOA as part of the plaintiff's case-

in-chief. Cross-Pet. 30-31, 37. But in *Allen*, the Sixth Circuit did not grant summary judgment on the basis of an RFOA defense the plaintiff had no opportunity to rebut. Instead, the court affirmed the order of summary judgment on other unrelated grounds. *See* 545 F.3d at 405 (affirming summary judgment for "two independent reasons," namely that the plaintiffs "fail[ed] to satisfy the specific-practice requirement and [did] not provid[e] sufficient statistical evidence of discriminatory impact").

The only other precedential circuit decision defendants cite, *Pippin v. Burlington Resources Oil & Gas Co.*, 440 F.3d 1186 (10th Cir. 2006), is likewise inapposite. *See* Cross-Pet. 37.[5] There, the defendant conceded that this Court's decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005) – which overturned Tenth Circuit precedent refusing to recognize a disparate impact claim under the ADEA – excused any failure by the plaintiffs to have properly presented a disparate impact claim at summary judgment. 440 F.3d at 1199. But the court of appeals refused to remand the case to the district court to consider the disparate impact claim in the first instance because none of the parties wished to produce additional evidence and the court of appeals' review of the evidence would be *de novo* in any event. *Id.* This case is entirely different. Here, plaintiffs have argued consistently that if provided an

[5] Defendants' citations to various unpublished decisions, *see* Cross-Pet. 37, fare no better. There was no allegation in either *Summers v. Winter*, 303 Fed. Appx. 716 (11th Cir. 2008), or *Durante v. Qualcomm, Inc.*, 144 Fed. Appx. 603 (9th Cir. 2005), that the plaintiffs were deprived of a fair opportunity to rebut the defendants' RFOA defense.

opportunity, they would have produced relevant expert testimony and vigorously challenged defendants' newly-minted RFOA defense. *See, e.g.*, C.A. Appellee Br. 39. Moreover, the jury's assessment of that evidence would have been subjected to exceedingly deferential review on appeal. *See, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Thus, *Pippin* provides no reason to believe that the Tenth Circuit would have decided this case any differently than the Second.

In any event, the summary order below was unpublished and nonprecedential. Even if it were in tension with the decision of another court, it would not create a conflict in the law of the circuits worthy of this Court's intervention.

2. Review is further unwarranted because the Second Circuit's refusal to order entry of judgment as a matter of law was correct. The only remotely plausible basis for permitting defendants to pursue their RFOA defense at this late date would be that their failure to do so at trial should be excused in light of changes in the law.[6] In such circumstances, the only appropriate remedy is a new trial at which the defendant is permitted to assert, and the plaintiff to rebut, the defense. Consider, for example, what would have happened if a plaintiff attempted to assert a disparate impact cause of action for the first time on appeal in the aftermath of this Court's decision in *Smith*. Had circuit precedent previously

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[6] Plaintiffs obviously contest this premise, and the district court found that nothing in the law at the time of trial precluded defendants from raising an RFOA defense. *See* Pet. 25-28; Pet. App. 32a-33a.

refused to recognize a disparate impact claim, it might be appropriate to excuse the plaintiff's failure to raise that previously barred claim at trial. But no one would think that it was permissible to award the plaintiff judgment as a matter of law on the grounds that the evidence the plaintiff had produced in support of a disparate treatment claim sufficed to show disparate impact. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). That the defendant had not rebutted this accidental showing would be entirely unsurprising and no reason to permit entry of judgment as a matter of law in the plaintiff's favor.

The Second Circuit properly recognized that the same is true in this case. Defendants cannot simultaneously point to alleged changes in the law to excuse their failure to assert an RFOA defense earlier and at the same time insist that plaintiffs should have anticipated the defense and rebutted it at trial.

III. The Third Question Presented Was Not Decided Below And Does Not Merit Review.

Finally, defendants ask this Court to decide whether its decisions "preclude employees, who have conceded the reasonableness of the non-age layoff factors in question, from defeating an employer's RFOA showing with allegations of 'subconscious age bias' or 'application problems,' or by showing that there were alternative non-age factors available that may have had less of a disparate impact." Cross-Pet.

ii.[7] Defendants do not allege any circuit conflict on this question. And because neither the court of appeals nor the district court reached the merits of defendants' RFOA defense, neither passed on the question in any event.

That, in itself, is sufficient reason to deny certiorari. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984) (noting that the Court does not "ordinarily consider questions not specifically passed upon by the lower court"). The Court's reluctance to decide questions not addressed below is particularly appropriate when it comes to challenges to the sufficiency of the evidence. "Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947). Thus, "a litigant should not have his right to a new trial foreclosed without having had the

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[7] There is a notable disconnect between this question and defendants' actual arguments in their brief. Although they repeatedly assert the general reasonableness of their practices, defendants hardly mention – much less defend – their assertion that plaintiffs are barred from showing that defendants' administration of their reduction in force was unreasonable because, although it had reasonable goals, it was implemented in a way that unnecessarily allowed age bias to affect the selection of workers for termination. *See* Cross-Pet. 40-43; *but see Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988) (recognizing availability of disparate impact claim to challenge an "employer's undisciplined system of subjective decisionmaking [that] has precisely the same effects as a system pervaded by impermissible intentional discrimination").

benefit of the trial court's judgment on the question." *Id.* at 217.

In fact, deciding the sufficiency of the evidence to support defendants' RFOA defense would not simply be imprudent, it would be unconstitutional. The Seventh Amendment limits judicial examination of jury verdicts to the rules of the common law at the time of the Amendment's adoption. *See, e.g., Balt. & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935). And, this Court has made clear that

> under the pertinent rules of the common law the Court of Appeals could set aside the verdict for error of law, such as the *trial court's* ruling respecting the sufficiency of the evidence, and direct a new trial, but could not *itself* determine the issues of fact and direct a judgment for the defendant, for this would cut off the plaintiff's unwaived right to have the issues of fact determined by a jury.

Id. at 658 (emphasis added). Accordingly, where, as here, the district court has never ruled on the sufficiency of the evidence to support an affirmative defense, the Seventh Amendment precludes that issue from being resolved for the first time on appeal. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 n.4 (2006) (explaining that any suggestion that "a court of appeals would be free to examine the sufficiency of the evidence . . . regardless of whether the district court had ever ruled on that motion" was "inconsistent with this Court's explanation of the requirements of the Seventh Amendment") (emphasis omitted).

Finally, review of the scope of the RFOA defense would be premature. As defendants acknowledge, the EEOC is presently working on notice-and-comment regulations to address the very questions defendants ask this Court to resolve. Cross-Pet. 13 n.2. Because the Commission's expert views are entitled to deference (or, at the very least, respect), *see Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2408 (2008) (Scalia, J., concurring in the judgment), the Court should await a case in which it can consider the RFOA's application in light of the resulting EEOC regulations, and in the context of a decision actually applying the defense to the facts of a particular case.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be denied.

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172

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IN THE
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KAPL, INC., LOCKHEED MARTIN CORPORATION, and JOHN J FREEH, both individually and as an employee of KAPL and Lockheed Martin,

Conditional Cross-Petitioners,

v.

CLIFFORD B. MEACHAM, THEDRICK L. EIGHMIE, ALLEN G. SWEET, JAMES R. QUINN, DEBORAH L. BUSH, RAYMOND E. ADAMS, WALLACE ARNOLD, WILLIAM F. CHABOT, ALLEN E. CROMER, BELINDA GUNDERSON, CLIFFORD J. LEVENDUSKY, BRUCE E. PALMATIER, NEIL R. PAREENE, MARGARET REYNHEER, JOHN K. STANNARD, DAVID W. TOWNSEND, and CARL T. WOODMAN,

Conditional Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

1. Plaintiffs' RFOA Waiver Arguments Were Considered, and Properly Rejected Previously and Should Be Rejected Again 2

2. This Court's Mandate and the Instructive Opinion in *Meacham* May Not Be Ignored 4

3. Granting Judgment for Knolls on the RFOA Defense is Consistent with the Law of this Case and Other Supreme Court Decisions 8

CONCLUSION 14

TABLE OF CITED AUTHORITIES

Page(s)

CASES

Baltimore & Carolina Line, Inc. v. Redman,
295 U.S. 654 (1935) 13

Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found.,
402 U.S. 313 (1971) 3

Meacham v. KAPL, Inc.,
554 U.S. 84 (2008) ("*Meacham*") ..... passim

Ontario v. Quon,
130 S. Ct. 2916 (June 17, 2010) 10, 11

Reeves v. Sanderson Plumbing,
530 U.S. 133 (2000) 10, 11

Smith v. City of Jackson,
544 U.S. 228 (2005) 4, 5, 10,

OTHER AUTHORITIES

Fed. R. Civ. P. 50 ..... passim

U.S. Constitution, Seventh Amendment 11

INTRODUCTION

This reply brief is submitted by conditional Cross-Petitioners (hereinafter, "Knolls") in response to the Brief in Opposition ("Opp. Br.") filed by Petitioners, the plaintiffs below (hereinafter, "plaintiffs"), in this important disparate impact age discrimination case.

For the reasons set forth here and in Knolls' conditional cross-petition, if the Court grants the underlying petition, it should also grant Knolls' cross-petition and end this 14-year old litigation on the merits by issuing an order (1) reversing the Summary Order issued by the Court of Appeals to the extent that it ordered a new trial "on the liability issues only," and (2) ordering that judgment be entered in favor of Knolls pursuant to Fed. R. Civ. P. 50(b), based on the existing trial evidence (which was not evenly or closely balanced) on the only substantive question left open after this Court's Opinion in *Meacham v. KAPL, Inc.*, 554 U.S. 84, 128 S.Ct. 2395 (2008) ("*Meacham*")).

This is because the existing trial record makes it clear, and no reasonable jury could find otherwise, that Knolls satisfied its burden of persuasion in response to plaintiffs' disparate impact claims by proving that the layoff factors it used to select plaintiffs for layoff (including "criticality" of skills and the "flexibility" to perform more than one job) were reasonable factors other than age ("RFOA").

ARGUMENT

1. Plaintiffs' RFOA Waiver Arguments Were Considered and Properly Rejected Previously and Should Be Rejected Again

In opposing Knolls' cross-petition, plaintiffs repeat and reargue the very same "waiver" and "abandonment" arguments which they previously made to this Court in *Meacham* (*compare* Pl. Opp. Br., *seriatim*, with Plaintiffs' Initial Supreme Court Brief in *Meacham*, 2008 U.S. S. Ct. Briefs LEXIS 299, at *11-12 (March 4, 2008), and Plaintiffs' Reply Brief, 2008 U.S. S. Ct. Briefs LEXIS 397, at *23 (April 14, 2008)). This fact was correctly observed by the Court of Appeals in support of its conclusion that this Court's Opinion in *Meacham* should be "read . . . as impliedly but necessarily rejecting plaintiffs' waiver argument." (Order, p. 4).

These same waiver arguments were also expressly and properly rejected by the Court of Appeals in "*Meacham II*," 461 F.3d 134, 146 n.9 (2d Cir. 2006) (where the court correctly held, in granting judgment as a matter of law to Knolls on its RFOA defense under both State and federal law, that "defendants [never] waived the argument[] that their business justification was 'reasonable.'"). Plaintiffs' attempts to raise these very same arguments again before this Court in response to Knolls' cross-petition should be rejected outright.

As the Second Circuit correctly noted in its Summary Order, this Court in *Meacham* "was squarely presented with plaintiffs' waiver argument, and a natural reading [of *Meacham*] suggests that it was rejected." (Summary Order, p. 4). Further, it is undisputed that Knolls included an RFOA defense in its answer, specifically asserting, *inter alia*, that "[t]he employment of plaintiffs . . . was terminated . . . for reasonable factors other than their ages within the meaning of the ADEA" (Joint App, p. 124). Thus, despite their protestations to the contrary, plaintiffs were given clear "notice of the [defense] and a chance to argue, if [they could], why the [defense] would be inappropriate," but they never did. *Blonder-Tongue Labs, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971).

Moreover, as demonstrated by the voluminous record already before this Court in *Meacham*, Knolls produced overwhelming and unchallenged RFOA evidence at trial. This evidence was plainly sufficient to put plaintiffs on notice that Knolls' defense was at all times based on proof that plaintiffs were selected for layoff based on job-related, legitimate, and reasonable non-age factors, including specifically their job performance, company service, criticality to the mission of the Laboratory, and flexibility.

2. This Court's Mandate and the Instructive Opinion in *Meacham* May Not Be Ignored

Like the Court of Appeals did below in refusing to grant judgment as a matter of law to Knolls, plaintiffs have improperly ignored the clear mandate and Opinion of this Court in *Meacham*. Similarly, plaintiffs and the court below have improperly ignored the plain language of the RFOA provision added to the ADEA by Congress, as interpreted by this Court in both *Meacham* and *Smith v. City of Jackson*, 544 U.S. 228 (2005).

For example, the Court in *Meacham* held in no uncertain terms that "[t]he focus of the [RFOA] defense is that the factor relied upon was a 'reasonable' one for the employer to be using." *Meacham*, 128 S.Ct. at 2403. The *Meacham* Court also explained clearly, in an Opinion written for the Court by Justice Souter, that "a reasonable factor may lean more heavily on older workers, as against younger ones" (*id.* at 2403), but "that the choice of a practice relying on a 'reasonable' non-age factor is good enough to avoid liability" under the RFOA exception of the ADEA. *Id.* at 2405 (emphasis added again).

Likewise wholly ignored by plaintiffs and in the Second Circuit's Summary Order are this Court's admonitions in *Meacham* to the effect that (1) "Congress took account of the distinctive nature of age discrimination, and the need to preserve a fair

degree of leeway for employment decisions with effects that correlate with age, when it put the RFOA clause in the ADEA, 'significantly narrow[ing] its coverage'" (*id.* at 2406 (quoting *City of Jackson*, 544 U.S. at 233)); (2) the more plainly reasonable the employer's 'factor other than age' is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious" (*id.* at 2406); and (3) the "burden of persuasion answers 'which party loses if the evidence is closely balanced'" and "' [i]n truth, however, very few cases will be in evidentiary equipoise." *Id.* (*quoting Schaffer v. Weast*, 546 U.S. 49, 56 and 58 (2005). Here, a review of the record before this Court in *Meacham* and before the courts below on remand show that the RFOA evidence in this case was neither closely balanced nor in evidentiary equipoise.

In sending this case back to the Court of Appeals for further consideration in light of the Opinion in *Meacham*, this Court did not, as plaintiffs have suggested, merely issue an "open-ended mandate" devoid of any guidance. (Pl. Opp. Br., p. 5). Instead, this Court clarified the nature and focus of the RFOA defense and reaffirmed the RFOA teachings handed down by the Court three years earlier in *City of Jackson*. It was of course in that case that this Court first held that disparate impact claims of age discrimination under the ADEA, while cognizable generally, "are strictly circumscribed by the RFOA exemption" (*id.* at 267 (O'Connor, J.,

concurring) (emphasis added)). And it was in *City of Jackson* where this Court first made it clear that (1) "the scope of disparate-impact liability under the ADEA is narrower than under Title VII" (*Id.* at 240); and (2) that the "business necessity" test and burden-shifting analysis previously applied in the Second Circuit at the time of the trial in the present action do not apply in disparate-impact age discrimination cases under the ADEA.

Undeniably, the Supreme Court's RFOA teachings in both *Meacham* and *City of Jackson* on the "focus" and Congressional purposes behind the RFOA defense – and, perhaps more importantly, on what it means to say, as this Court held in *Meacham*, that employers bear the burden of persuasion on this statutory defense – must be considered in deciding whether or not Knolls satisfied its RFOA burden of persuasion. But the Summary Order ignored all of this Court's teachings and liability-limiting instructions (in both *Meacham* and *City of Jackson*) in deciding that Knolls is not entitled to judgment as a matter of law because "uncertainty and multiple changes in the governing law have complicated the issues in this case." (Order, p. 4). In this respect, the Summary Order fails to carry out and is inconsistent with the mandate and Opinion in *Meacham*, is clearly erroneous, and must be reversed.

In fact, the only question remanded to the Court of Appeals by this Court in *Meacham* was

whether the outcome in *Meacham II*, where this Court correctly observed that the Court of Appeals "showed no hesitation in finding that Knolls prevailed on the RFOA defense" (*Meacham*, 128 S. Ct. at 2406), "should be any different when the burden is properly placed on the employer." That the Court of Appeals failed to carry out and/or misconstrued the mandate and Opinion in *Meacham* seems clear.

Indeed, even the plaintiffs admit in their opposition brief that "the court of appeals did not decide whether defendants had established an RFOA defense on the pre-existing trial record." (Opp. Br., p. 5). Plaintiffs similarly admit, as they must, that the Second Circuit on remand following this Court's Opinion in *Meacham* "refus[ed] to examine the current trial record" (*id.* at 6 n.4), and that "neither the court of appeals nor the district court reached the merits of defendants' RFOA defense." (*Id.*, at 11). Plaintiffs further concede in their opposition brief "that any misconstruction of the mandate [in *Meacham* by the Second Circuit] would warrant correction" by this Court. (Pl. Opp. Br., p. 5). That is the case here.

Accordingly, for all of these reasons, and those set forth in Knolls' cross-petition, this Court should reverse the Second Circuit's new trial order, find that the uncontested and overwhelming record evidence of reasonableness proved at trial by Knolls satisfied its burdens both of production and

persuasion on the RFOA defense, and enter judgment as a matter of law in Knolls' favor on plaintiffs' disparate impact claims, as if on summary judgment, just as the Court did in *City of Jackson*.

3. Granting Judgment for Knolls on the RFOA Defense is Consistent with the Law of this Case and Other Supreme Court Decisions

In opposing Knolls' cross-petition, plaintiffs would have this Court completely ignore not only the full Opinion in *Meacham*, but also certain prior findings made by the Court of Appeals in *Meacham II*. These still-valid findings, all of which are fully supported by the existing record evidence and which this Court never disagreed with in *Meacham*, are still the law of this case.

For example, the Second Circuit in *Meacham II* granted Knolls' motion for judgment as a matter of law based on its finding that although "[t]here may have been other reasonable ways for [Knolls] to achieve its goals . . ., the one selected was not unreasonable." Of course, this is just as it was in *City of Jackson*.

The Court of Appeals in *Meacham II* also found that the proof of reasonableness put on by Knolls at trial established without question or challenge (1) "that the specific features of the IRIF challenged by plaintiffs were routinely-used components of personnel decision-making systems in

general, and were appropriate to the circumstances that provoked KAPL's IRIF." 461 F.3d at 144. In similar fashion, in *Meacham II*, the court also found (based in large part on the unchallenged testimony of Knolls' expert, Frank Landy) that "the criteria 'criticality' ad 'flexibility' were ubiquitous components of 'systems for making personnel decisions,' and that the subjective components of the IRIF were appropriate because the managers conducting the evaluations were knowledgeable about the requisite criteria and familiar with the capabilities of the employees subject to evaluation." *Id.*

As the Second Circuit correctly held in *Meacham II*, this and other evidence of reasonableness introduced at trial by Knolls demonstrated beyond dispute that "KAPL set standards for managers constructing matrices and selecting employees for layoff, and [Knolls] did monitor the implementation of the IRIF," thereby "restrict[ing] arbitrary decision-making by individual mangers." *Id.* at 145. In fact, as the Second Circuit correctly found in *Meacham II*, "KAPL's staffing manager testified to the importance of criticality and flexibility to ensuring that [it] could carry on operations with a shrinking workforce." *Id.* at 144. "This evidence," it was also correctly held, "unquestionably discharged [Knolls'] burden of production" on the RFOA defense. *Id.*

Nothing in this Court's decision in *Meacham* indicates in any way that these findings and holdings by the Second Circuit in *Meacham II* are no longer good law. Accordingly, because these still-valid findings are fully supported by the record evidence, and are consistent with this Court's decisions in *Meacham* and *City of Jackson*, the Second Circuit erred in not granting Knolls' repeated requests for judgment as a matter of law in its favor on the RFOA defense, pursuant to Rule 50(b). *See Reeves v. Sanderson Plumbing*, 530 U.S. 133, 148-49 (2000), *City of Jackson, supra*, and *Ontario v. Quon*, 130 S. Ct. 2619 (June 17, 2010).

Furthermore, even if there was no law of this case, plaintiffs do not genuinely dispute many of the facts set forth in Knolls' cross-petition in support of this continued motion. In fact, plaintiffs have failed to dispute in any material way any of the facts set forth by Knolls with respect to the RFOA evidence introduced at trial (*see* Cross-Pet., pp. 6-11), the jury instructions given by the District Court to the jury (*id.* at 11-15), regarding Knolls' arguments to the jury in summation (*id.* at 1517), regarding Knolls' Rule 50 motions and the assigned Magistrate Judge's denial of Knolls' Rule 50(b) motion on plaintiffs' disparate impact claims (*id.* at 18-21). This is for the simple reason that these facts are fully supported by the record before this Court in *Meacham*, and before the lower courts on remand.

Notably, plaintiffs have also failed to dispute in any way Knolls' position on the exceptional national importance of this case and of the questions implicated by the Second Circuit's Summary Order to both employers and employees alike. (*See id.* at pp. 28-40). Likewise notable is the plaintiffs' failure to oppose or respond in any material way to the arguments made by Knolls at pages 40-43 of their cross-petition. This includes plaintiffs' failure to address or respond to Knolls' arguments in support of their continued motion for judgment as a matter of law based on this Court's decisions in *Reeves v. Sanderson Plumbing*, 530 U.S. 148-49, *City of Jackson, supra*, and *Ontario v. Quon*, *supra*.

Like the facts in Knolls' cross-petition, each of these cases supports Knolls' position that it should be awarded judgment as a matter of law dismissing plaintiffs' disparate impact claims, as this Court did in *City of Jackson*, based both on plaintiffs' failure to identify a specific facially neutral practice that caused a disparity (contrary to plaintiffs' misrepresentations that they did so), and on indisputable and overwhelming record evidence proving that the layoff factors relied upon by Knolls (including but not limited to criticality and flexibility of skills) were not obscure factors, but were reasonable factors to use in the circumstances of this case, as a matter of law.

The cases cited by plaintiffs in their opposition brief do not compel or warrant a different conclusion.

In fact, a number of these cases discussed below fully support Knolls' position that this Court may grant Knolls' motion for judgment as a matter of law, pursuant to Rule 50(b), rather than countenancing the need for a new trial.

Contrary to plaintiffs' argument to the effect that the Seventh Amendment prohibits this Court from "deciding the sufficiency of the evidence" on appeal in this case (Pl. Opp. Br., p. 12), this Court clearly has the power to enter judgment as a matter of law in favor of Knolls instead of allowing for a new trial as the Second Circuit has now ordered. Indeed, the cases relied upon by plaintiffs for a contrary argument are not only cited out of context, but, when read in their entirety, actually support Knolls' position and request for relief.

Thus, for example, the sole issue in *Cone v. W. Va. Pulp & Paper Co.*, was whether, in the absence of a Rule 50(b) motion for judgment not withstanding the verdict, "an appellate court [has the] power to direct the District Court to enter judgment contrary to the one it had permitted to stand." 330 U.S. 212, 217-18 (1947). In declining to permit entry of judgment, this Court limited its ruling in *Cone* to circumstances in which the moving party failed to timely file a Rule 50(b) motion with the trial court. *Id.* at 218. That is plainly not the case here.

In fact, the record in this case makes it clear that, following the entry of the jury's disparate impact verdict in favor of plaintiffs, Knolls (unlike the defendant in *Cone*) made timely motions under Rule 50(a) and then renewed their motion for judgment as a matter of law under Rule 50(b). Each time, Knolls challenged the sufficiency of plaintiffs' disparate impact evidence, arguing that the plaintiffs failed to establish a *prima facie* case of disparate impact discrimination and that the plaintiffs' layoffs in the reduction in force were justified.

Plaintiffs' reliance on *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935), is also misplaced. In *Redman*, this Court modified the judgment of the Second Circuit, which had held that the trial evidence was insufficient to support the plaintiff's verdict and thus ordered a new trial. In doing so, this Court modified the Court of Appeals' judgment by "substituting a direction for judgment of dismissal on the merits in place of the direction for a new trial." *Id.* at 661.

Simply put, as the Supreme Court made clear in *Redman*, where the sufficiency of the evidence is properly challenged at the trial level, as it was repeatedly here (*see Meacham II*, 461 F.3d at 146 (noting "[d]efendants repeatedly sought judgment as a matter of law with respect to both the ADEA and HRL claims")), this Court has the power to order judgment as a matter of law, instead of a new trial.

CONCLUSION

If the Court grants plaintiffs' underlying petition, Knolls' cross-petition should also be granted, and the Court should grant judgment in favor of Knolls and dismiss plaintiffs' disparate impact claims in their entirety, as a matter of law.

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Respectfully submitted,

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